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No. 86-306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STUART GREEN AND LESLIE GREEN,
Appellants,

v.

DEPARTMENT OF HUMAN SERVICES OF THE STATE OF WEST VIRGINIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

1) Whether the Due Process Clause of the Fourteenth Amendment dictates the burden of production and standard of proof placed upon a State seeking to prevent reunification of a natural family at a factfinding modification hearing after a clear showing by parents that the termination of their parental rights in their natural child was erroneous.

INDEX

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5
RAISING THE FEDERAL QUESTION	5
STATEMENT OF THE CASE	8
THE FEDERAL QUESTION IS SUBSTANTIAL	16
CONCLUSION	29
APPENDIX	A1

AUTHORITIES CITED

Cases:

Lassiter v. Department of Social Services, 452 U.S. 18 (1981)	27
Japan Lines, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)	8
Santosky v. Kramer, 455 U.S. 745 (1979)	19, 20, 21, 27

Constitution:

U.S. Const. amend. XIV, §1 . . 3, 5, 7, 19, 20, 26

Statutes:

28 U.S.C. §1257(2) 3

28 U.S.C. §1257(3) 4, 8

W. VA. CODE §49-1-3 et. seq. (1980) . . . 9

W. VA. CODE §49-6-2 (1985 Cum. Supp.) . 5, 19, 21 22, 24, 26

W. VA. CODE §49-6-5 (1985 Cum. Supp.) . 5, 17, 19 23, 24

W. VA. CODE §49-6-6 (1980) . . 3, 5, 7, 17, 19, 21, 23, 24, 25, 26

INDEX TO APPENDIX

Order, Circuit Court of Jefferson County,

West Virginia, December 14, 1984 . . . A1

Order, Circuit Court of Jefferson County,

West Virginia, July 2, 1984 . . . . . B1

Conclusions of Law and Findings of Fact,

Circuit Court of Jefferson County,

West Virginia, July 3, 1984 . . . . . C1

Order, Supreme Court of Appeals of

West Virginia, May 27, 1986 . . . . . D1

Order, Supreme Court of Appeals of West Virginia, November 7, 1985 . . . E1

Notice of Appeal to the Supreme Court of the United States F1

W. VA. CODE §49-6-2 (1985 Cum. Supp.) . . G1

W. VA. CODE §49-6-5 (1985 Cum. Supp.) . . H1

W. VA. CODE §49-6-6 (1980) I1

Order, Circuit Court of Jefferson County, West Virginia, April 15, 1986 . . . . J1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. _____

STUART GREEN AND LESLIE GREEN,

Appellants

v.

DEPARTMENT OF HUMAN SERVICES
OF THE STATE OF WEST VIRGINIA,

Appelle

On Appeal from the Supreme Court

of Appeals of West Virginia

JURISDICTIONAL STATEMENT

OPINIONS BELOW

On December 14, 1984, an order of the Circuit Court of Jefferson County, West Virginia, terminating the appellants' parental rights in their natural child, was filed. The order contains the findings

of fact and conclusions of law of the trial court. This order is set forth in Appendix A.

On July 2, 1985, an order of the Circuit Court of Jefferson County, West Virginia denying appellants' motion to modify the terminating disposition previcusly imposed was filed. This order is set forth in Appendix B. This order incorporated a portion of the record of the modification hearing containing the findings of fact and conclusions of law reached by the court. These findings of law and conclusions of fact are set forth in Appendix C.

On May 27, 1986, an order of the Supreme Court of West Virginia was filed. This order denied an application for appeal filed by appellants against the circuit court denial of appellants' motion to modify the termination of their parental rights. This order is set forth in Appendix D.

A previous appeal from the Supreme Court of Appeals of West Virginia was filed by appellants in this Court. The previous appeal addressed the

denial of the Supreme Court of Appeals of West Virginia to allow appellants to appeal the December 14, 1984 termination order of the Circuit Court of Jefferson County. The denial of appellants' previous application for appeal is set forth in Appendix E. The previous appeal in this Court was filed in Stuart Green, et ux., v. Department of Human Services, No. 85-1311, October Term, 1985. The previous appeal was dismissed for want of a federal question.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2). This appeal draws into question the validity of a statute of West Virginia on the ground of its being repugnant to the Constitution of the United States. Specifically, this appeal challenges West Virginia Code §49-6-6 as applied to the facts of this case of first impression on the ground that, as applied, the statute violates the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, §1.

The order of the Supreme Court of Appeals of West Virginia approving the trial court's denial of appellants' motion for modification of the disposition of their child was entered on May 27, 1986. By denying appellants' application to appeal the trial court's decision regarding modification, the Supreme Court of Appeals of West Virginia expressly approved the manner in which the trial court interpreted and applied the statute the appellants now challenge. This was a case of first impression in West Virginia. A notice of appeal to this Court was filed in the Supreme Court of Appeals of West Virginia and in the Circuit Court of Jefferson County, West Virginia on July 31, 1986. Appendix F.

In the event the Court does not consider appeal the proper mode of review, appellants request the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of ceriorari pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. CONST. amend. XIV, §1

W. VA. CODE § 49-6-2 (1985 Cum. Supp.) (Appendix G)

W. VA. CODE § 49-6-5 (1985 Cum. Supp.) (Appendix H)

W. VA. CODE § 49-6-6 (1980) (Appendix I)

RAISING THE FEDERAL QUESTION

At the conclusion of the circuit court hearing

on the appellants' motion for modification of the previous dispositional order, counsel for the appellants excepted and objected to the trial court's ruling. The trial court held, that as a matter of law, the appellants not only had to show that the conditions causing the child abuse had been removed, but that the return of the child to her natural parents would be in the best interests of the child. Counsel for the appellants argued that once the appellants had demonstrated the conditions leading to the abuse and the removal and correction of those conditions, the burden then shifted to the Department of Human Services to prove that the reunification of the family should not take place because of potential danger to the child.

Appellants filed a Petition for Writ of Error and Superseadeas in the Supreme Court of Appeals of West Virginia and specifically argued that the evidentiary burden placed upon the appellants at the modification hearing was a denial of due

process under the Fourteenth Amendment to the United States Constitution.

The circuit court, at the modification hearing, and the appellants, in their petition for an appeal to the Supreme Court of Appeals of West Virginia, both identified this case as a case of first impression under the West Virginia modification statute. W. VA. CODE §49-6-6 (1980). This statute does not specifically establish the burden of production or the burden of proof at a modification hearing. The circuit court's interpretation and application of the statute was attacked in the Supreme Court of Appeals of West Virginia on the ground that the statute as written and applied violated the Fourteenth Amendment. In denying the appellants' petition for appeal, the Supreme Court of Appeals of West Virginia sustained the State statute, as applied, against the contention that such application would violate the Fourteenth Amendment. Thus, this matter is appropriately brought to this Court

by appeal. Japan Lines, Ltd. v. County of Los Angeles, 441 U.S. 434, 440-41 (1979). In the event the Court does not consider appeal the proper mode of review for this matter, appellants request that this writing be regarded and acted upon as a petition for certiorari pursuant to 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

Appellants, Stuart and Leslie Green, lived with their two children, Joseph and Tiffany, in a communal residence owned by John and Dorothy McClellan in Jefferson County, West Virginia. Both Stuart and Leslie Green had joined the group years before at young and impressionable ages. On October 5, 1982, Joseph Green died as a result of shock due to numerous blows to his buttocks. Stuart and Leslie Green were arrested and subsequently tried and convicted of involuntary manslaughter. Their surviving child, Tiffany, then two (2) years of age, was taken by the Department

of Human Services [hereinafter the "State"] and placed with Mr. and Mrs. Nicely, temporary foster parents.

Approximately two (2) weeks after Joseph Green died, another daughter, Julie Green, was born to the appellants. The State sought and obtained temporary legal custody of Julie Green, but physical custody of Julie was always maintained by the appellants and Julie's paternal grandparents. On April 15, 1986, full legal and physical custody of Julie Green was returned to appellants and all proceedings involving Julie Green were terminated. Appendix J.

The State, however, moved to terminate the parental rights of Stuart and Leslie Green in Tiffany. In October, 1982, at a hearing before the Circuit Court of Jefferson County [hereinafter "trial court"], the State moved to have Tiffany declared an abused child under West Virginia's Child Abuse Statute. W. VA. CODE §§49-1-3 et

seq. (1980). The hearing was continued on the motion of the State and the appellants agreed to the continued care of Tiffany by Mr. and Mrs. Nicely.

The death of Joseph Green was widely publicized and public outrage apparently surfaced. In 1983 the legislature of West Virginia made extensive amendments to the Child Abuse Statute. One of these amendments expanded the definition of "abused child" to include any sibling of a child physically injured by his parents. After the new law became effective in 1984, the State moved to recommence the child abuse hearing involving Tiffany Green. On July 18, 1984, the hearing resumed. At the conclusion of that hearing, the trial court found that Tiffany could not have been an abused child under the statute in effect in 1982 but was an abused child under the statute as amended. Over appellants' objection, the trial court retroactively applied the amended statute and found Tiffany to be an abused child.

On October 2, 1984, a dispositional hearing was held before the trial court. At the conclusion of that hearing, the trial court terminated the parental rights of the appellants in Tiffany Green. The State allowed Tiffany to remain in the custody of Mr. and Mrs. Nicely and began preparation to consent to the adoption of Tiffany by the Nicelys. Under West Virginia law, no adoption of a child (after involuntary termination of parental rights) can take place until all appeals from the termination proceedings are exhausted.

In October, 1984, appellants retained new legal counsel. Investigation by new counsel disclosed that: the previous attorney representing the appellants had been hired by Dorothy McClellan; Dorothy McClellan had been indicted for conspiracy leading to the death of Joseph Green and had not yet been tried; the previous attorney had purposefully concealed evidence explaining how the death of Joseph Green came about; the evidence concealed

by the attorney could have helped the appellants in the termination proceeding; the evidence concealed by the attorney could have and eventually did aid the State of West Virginia in its successful prosecution against Dorothy McClellan. Appellants' new counsel began an immediate investigation into the cause and circumstances of Joseph Green's death. As a result of that investigation, evidence was obtained that clearly indicated Dorothy McClellan was a strong and powerful cult leader. The beating of Joseph Green was just one of many acts of excessive child discipline that members of the cult had carried out under Dorothy McClellan's direction and influence. Upon advice of their new counsel, Stuart and Leslie Green broke off all contacts with Dorothy McClellan and her group and began immediate psychotherapy with Dr. Harold Goldstein, a nationally recognized psychologist specialing in the rehabilitation of people subjected to thought reform techniques and indirect behavioral

modifcation techniques often found in cults.

On April 11, 1985, appellants filed a motion for modification of the dispositional order of termination entered on October 2, 1984. Appellants also filed a petition in the Supreme Court of Appeals of West Virginia to appeal the October 2, 1984 decision on several grounds. On July 2 and 3, 1985, a modification hearing was held before the trial court. At this hearing uncontroverted evidence was presented to the trial court, by both fact and expert witnesses, that but for the extraordinary circumstances of the cult and the dominance of Dorothy McClellan, the death of Joseph Green would not have occurred. Evidence was presented that the appellants had maintained frequent and numerous contacts with Tiffany. Visits had occurred frequently and the parents and child communicated with one another regularly. Additional uncontroverted evidence was introduced that the appellants had removed themselves both physically

and psychologically from the cult and had successfully raised their other child, Julie Green. Dr. Leon Rosenberg of Johns Hopkins University, an expert in child-parent relationships, testified that he examined the parent-child relationships between both Julie and Tiffany Green and the appellants. He further testified that due to numerous and frequent visits and contacts Tiffany still identified appellants as her parents. He testified that appellants did not present any of the behavioral traits or characteristics of abusive parents. He testified that to fail to return Tiffany to appellants could cause long term psychological damage to Tiffany. When asked whether Tiffany would suffer if separated from her foster parents, the Nicelys, Dr. Rosenberg stated that Tiffany's separation anxiety would not be great because of her acknowledgement of appellants as her parents and the companionship. He recommended a reunification of the family. Dr. Harold Goldstein of the National

Institute of Mental Health, an expert psychologist and member of the American Psychological Association Taskforce on Deceptive and Indirect Methods of Persuasion and Control, testified that appellants were both receiving psychotherapy from him and both were detached from the cult and were not suspectible of joining any other cult or communal group. He recommended a reunification of the family. The State had one material witness, a social worker, who testified that because in her opinion that the Nicelys and Tiffany had bonded, the best interests of Tiffany dictated that Tiffany remain with her foster parents. She testified further that, in her opinion, the appellants needed to make further progress. When asked for his opinion, the guardian ad litem of Tiffany Green recommended to the trial court that the family be reunited.

The trial court noted that this was a case of first impression under the Child Abuse Statute and that there were no precedents to guide the

trial court. The trial court then found that a cult atmosphere existed at the commune and that the appellants had made progress toward detachment and independence. However, the trial court found the appellants had still to finish psychotherapy and establish their own household and economic indepedece. The trial court found that these future disruptions could create anxiety and that Tiffany was now in a stable home. The trial court concluded that the appellants were required, under the modification statute to prove that the family reunification was in the best interets of the child and that the appellants had failed to meet that burden and therefore the motion for modification was denied.

THE QUESTION IS SUBSTANTIAL

West Virginia is just one of several states with child abuse statutes containing provisions for judicial review of involuntary parental termination proceedings if circumstance change after termination of parental rights but before an adoption

of the child has occurred. W. VA. CODE § 49-6-6 (1980) Appendix I. Under West Virginia law, no adoption can take place until all appeals from the permanent termination decision are final. W. VA. CODE § 49-6-5(a)(6) (Cum. Supp. 1985). Thus, under the West Virginia Child Abuse Statute, any parent petitioning the Supreme Court of Appeals of West Virginia to appeal a termination decision would automatically create a period of some months in which to pursue action to remove the causes of the abuse resulting in termination of parental rights. If these corrective actions were successful and resulted in a removal of the causal factors of abuse, the parents could obtain a modification of the termination disposition and possibly win familial reunification.

This senario occurred in the instant case. The senario could and will be repeated in West Virginia and any other state in which judicial review of termination proceedings is allowed upon allega-

tions of improvement in or removal of the factors and circumstances leading to or creating the abuse leading to the termination of parental rights.

The question presented by this appeal is what burden and standard of evidence is Constitutionally required at such a modification hearing. Appellants argued that after they met the initial burden of production by showing the causes of the abuse and the removal of said causes, the burden of production passed to the State to show by clear and convincing evidence why family reunification should not occur. The trial court held that the appellants carried an evidentiary burden through out to prove that family reunification was in the best interests of the child. The trial court did not expressly define the evidentiary standard of proof required from the appellants. However, a review of the record discloses that the evidentiary standard imposed by the trial court was more than a preponderance standard and was more probably a clear and convincing standard. It should be noted

that the West Virginia modification statute does not return the trial court to the "dispositional stage" of the bifurcated West Virginia abuse proceeding See, W. VA. CODE § 49-6-5 (1985 Cum. Supp.). The West Virginia modification statute requires the trial court to return to the "factfinding" stage of the bifurcated abuse proceeding. See, W. VA. CODE §49-6-2 (1985 Cum. Supp.).

"Upon motion of a child's parent or custodian or the state department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section two [§ 49-6-2] of this article and may modify a dispositional order . . ."

W. VA. CODE §49-6-6 (1980).

This Court addressed the evidentiary standard required by the Due Process Clause of the Fourteenth Amendment in the factfinding stage of New York State's bifurcated parental rights termination proceedings. Santosky v. Kramer, 455 U.S.

745 (1979). In Santosky v. Kramer, the Court held that New York could not Constitutionally and permanently terminate natural parents' rights in their child unless the state proved by clear and convincing evidence that the state had made diligent efforts to reunite the family and that the child's natural parents failed substantially and continuously to maintain contact with or plan for the future of the child although capable of doing so. The Constitutional issue involved in the Santosky v. Kramer case was whether the Fourteenth Amendment required New York to prove its case at the factfinding portion of the termination proceeding by the clear and convincing standard of proof. This Court held that the Fourteenth Amendment required the application of the clear and convincing standard.

The Court clearly distinguished between the factfinding stage and the dispositional stage of New York's bifurcated proceeding. Id., 455 U.S. at 760-61. The clear and convincing evidentiary standard was held to be required only at the factfind-

ing stage and not at the dispositional stage.

> At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the dispositional stage that the interets of the child and the natural parents do diverge . . . But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.

Id., 455 U.S. 760-71. (emphasis in original)

Under the West Virginia statutory scheme, a modification motion under W. VA. CODE § 49-6-6 (1980), must contain sufficient allegations of a change of circumstances to require a different disposition. Upon the filing of such a motion, the statute requires that the trial court conduct a new factfinding hearing pursuant to W. VA. CODE § 49-6-2 (Cum. Supp. 1985). Section 49-6-2 governs the initial factfinding hearing held to determine if a child is abused or neglected. Section 49-6-2 places a burden upon the State to prove the allega-

tions of abuse or negligence by clear and convincing proof. W. VA. CODE § 49-6-2(a) (Cum. Supp. 1985). Section 49-6-2 does not contain any language applicable only to a modification hearing after an initial determination of abuse and disposition of termination but prior to the exhaustion of all appeals and an adoption of the child.

At the modification hearing before the trial court, appellants assumed they had the initial burden of producing evidence to prove the allegations of the change of circumstances detailed in their motion for modification. The appellants presented such evidence. The evidence detailed the facts and circumstances leading to the abuse and successful efforts of the appellants to obliterate the causes and circumstances of the abuse. The appellants presented further evidence of the still strong psychological bonding existent between Tiffany and the appellants and expert testimony that a failure to return Tiffany to the appellants

would result in long term psychological damage to Tiffany.

The trial court acknowledged the validity of the change in circumstances but held that the appellants carried an additional burden of proving the reunification of the family was in the best interest of the child. Although the appellants contend that they met this evidentiary burden, they argue that the burden of production should not have been placed upon them after they proved a change of circumstances removing the factors leading to the abuse. At that point, the burden of production should have passed to the State to prove by clear and convincing evidence that the child should not be reunited with her family.

West Virginia could have easily drafted Seciton 49-6-6 so that a new dispositional hearing would be held in accordance with Section 49-6-5 upon a modification motion. However, this is not what West Virginia did. West Virginia passed Section

49-6-6 into law with a requirement that a new factfinding hearing be held pursuant to Section 49-6-2. The reason for this legislative requirement becomes apparent when other provisions of the Child Abuse Statute are considered. Under the statute controlling the dispositional stage of the termination proceeding, a mandatory order of precedence in dispostional alternatives indicates a strong leglisative intent that children should be returned to their family if at all possible. W. VA. CODE § 49-6-5(a) (Cum. Supp. 1985). Indeed permanent termination of parental rights is prohibited unless the trial court finds "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected." W. VA. CODE § 49-6-5(b) (Cum. Supp. 1985). No adoption of a child is allowed until all termination proceedings and appeals thereof are final. W. VA. CODE §49-6-5(a)(6) (Cum. Supp. 1985). And Section 49-6-6 allows modification of a termination disposition even after

the exhaustion of all appeals so long as an adoption has not yet occurred. Read together, the clear legislative intent behind the West Virginia Child Abuse Statute is to prevent the termination of parental rights and to allow for correction of a termination disposition in the event subsequent acts of the parents demonstrate that the trial court's initial decision (that there was no reasonable likelihood that conditions of abuse can be substantially corrected) was erroneous.

Once the terminated parents prove a change of circumstance demonstrating a reasonable likelihood that the conditions of abuse have been corrected, the burden of production and burden of proof by clear and convincing evidence must be returned to the State. That is why Section 49-6-6 is written to require a return to the factfinding hearing as opposed to the dispositional hearing. If a charge of circumstance occurs showing that the dispositional termination was incorrect because

there has been a substantial correction of the conditions of abuse, the statute requires the trial court to go back to the factfinding stage and re-examine all the operative factors involved in the abuse. If the trial court finds the conditions of abuse have been substantially corrected, it has authority to vacate the termination disposition.

The trial court found a substantial correction of the conditions of abuse, but then continued to apply a burden of production and a clear and convincing burden of proof upon the appellants. The application of these burdens of production and proof to the appellants at the hearing held pursuant to Section 49-6-2 violated the Due Process Clause of the Fourteenth Amendment.

A hearing held upon a motion filed pursuant to Section 49-6-6 represents the last opportunity for parents to correct an erroneous decision to terminate their parental rights. Upon proof of substantial correction of the conditions of abuse,

the parents have proven the termination disposition incorrect and erroneous. A failure to require the State to produce clear and convincing evidence as to why the error should not be corrected, results in a Constitutional deprivation.

"A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one." Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981).

> The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections then do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. 745, 753-54 (1981).

In this case, the facts carry an additional argument. The reason the appellants did not move

even earlier to correct the conditions of abuse was because their previous attorney was engaged in a conspiracy of silence to prevent the disclosure of evidence which could aid in the prosecution of Dorothy McClellan. This evidence was suppressed at the expense of the parental rights of the appellants. Proof of the actions of the appellants' previous attorney was placed in the record at the conclusion of the modification hearing and was presented to the Supreme Court of Appeals of West Virginia along with an argument that the conflict of interest of appellants' previous attorney rendered the termination proceedings Constitutionally infirm. This issue was presented to this Court in the appeal from the initial termination decision. In its motion to dismiss the previous appeal, the State argued that the previous attorney was privately retained and the appellants' recourse was to proceed against the previous attorney in a civil suit. However, a civil suit against their previous attorney will not allow the appellants to regain

custody of Tiffany. The only procedural mechanism available to them was to seek a modification of the termination order.

The case also contains glaringly inconsistent treatment of the appellants' two children by the State. Julie Green has been returned to the full legal and physical custody of the appellants. Her sister, Tiffany Green, has been taken and is on the verge of being adopted. The difference in treatment is due to a terrible mistake made in regard to the initial decision to terminate the parental rights of the appellants to Tiffany Green. West Virginia set up a mechanism to correct such mistakes before the termination decision becomes irrevocable. However, by the application of Constitutionally repugnant burdens of production and proof, the purpose of the corrective statute was frustrated.

CONCLUSION

For the aforegoing reasons, summary reversal should be granted, or in the alternative, probable

jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT OF JEFFERSON COUNTY,

WEST VIRGINIA

SITTING AS A JUVENILE COURT

DEPARTMENT OF HUMAN SERVICES

vs. Petition No. 82-J-74

TIFFANY GREEN, Infant

LESLIE GREEN, Mother

STUART GREEN, Father

Defendants

O R D E R

This matter came on for hearing this 2nd day of October, 1984, upon the papers and pleadings formerly read and had herein; upon the preliminary hearing commenced on the 13th day of October, 1982, at the conclusion of which said hearing the Petitioner did rest its case; upon the subsequent orders entered herein continuing the matter over; upon the calling of the matter on for hearing this day and date; upon the appearance of the Petitioner Joseph Corbin, Jr., in person and by counsel Braun

A. Hamstead, Prosecuting Attorney of Jefferson County, West Virginia; upon the appearance of the Respondent parents in person and by counsel, John C. Skinner, Jr., and upon the appearance of the child in person and by her guardian ad litem, James Crawford; upon the appearance of the divers witnesses in the case.

WHEREUPON the Petition proceeded to call its witnesses, and did place into evidence certain exhibits marked as "Petitioner's Exhibits No. 1, 2 & 3," to which exhibits the Defendant parents did not object or except.

During the cross-examination of witness for the Petitioner, Dr. Guy Brooks, counsel for the Defendant parents did mark and place into evidence Respondents' Exhibit No. 1, to which the Petitioner did not object or except, and upon the taking of further testimony for the Petitioner, the Court did conclude that a recess was necessary for a period of one hour, and, after a period of that one hour, testimony did resume, at the conclusion

of which the Petitioners did rest their case at this final hearing.

WHEREUPON Counsel for the Defendant parents did make a Motion for Judgement on behalf of the Respondent parents, which said Motion was denied by the Court, and the Respondents did then present evidence by divers witnesses, at the conclusion of which testimony the Respondent parents did rest.

WHEREUPON the Petitioner did present testimony in rebuttal to the testimony offered by the Respondent parents, at the conclusion of which the Petitioners did rest their case in rebuttal.

After hearing the closing arguments of counsel, and in consideration of all evidence presented, the Court does make the following findings of fact:

That all findings of fact made the Court at prior hearings and included in that Order dated July 18, 1984, are hereby incorporated into this Order for all pertinent purposes:

That the testimony of Marcie Kemner, agent for the Department of Human Services, sets forth the fact that at no time during her involvement in the case, a period of some one and one-half years, did the Respondent parents cooperate with her in any way, nor did they express to her any indications of remorse whatsoever;

That the testimony of Dr. Guy Brooks was to the effect that the parent Leslie Green did not cooperate with his testing under an Order of a Circuit Court of West Virginia in a related child abuse and neglect proceeding involving the other sibling of the deceased child, Joseph Marshall Green, so that the sibling could be psychologically tested and evaluated by him in accord with that said Court Order;

That the report of the evaluation made by one Dr. Bradley Soule (at the request of Counsel for the Respondent parents) indicates that the parent Stuart Green was operating under an intense religious belief and felt that the death of the child

was attributale to "God's will;" and further that Dr. Soule expressed reservations about returning the child to her parents.

That Dr. Trevor Stokes, Associate Professor of Psychology at West Virginia University, interviewed the child Tiffany Green and the foster parents, Mr. & Mrs. Glen Nicely, but did not interview the Respondent parents; that in response to a hypothetical question posed by the attorney for the Petitioners incorporating the facts of this case as to whether or not there would be a risk in returning the child to the custody of the parents, the witness responded that there would be a high risk;

That the testimony of Joseph Corbin, Agent of the West Virginia Department of Human Services, established that he was the first Department agent to make contact with the group known as "Stonegate;" that there had been an arrangement between the Department and the Respondent parents regarding certain actions by the parents to reassure the

Department that the parents were making efforts to change their style of interaction with their remaining children; that this arrangement was reduced to writing, and required: (1) a. that the parents would receive psychological counseling and/or therapy, and that the Department would have access to the therapist and to all reports; (1) b. that a local psychologist or psychiatrist was to be utilized, if at all possible; (2) that the parents attend educational sessions that would teach them parenting skills and the recognition and observation of a child's development process; (3) that the recommendation of the Department depended on when a point in time was reached that the Department felt the children would be safe; (4) the parents would continue to cooperate with the Department through its agents and workers; Mr. Corbin further testified that the parents had fulfilled the requests made of them by the Department:

That Dr. Miram Sizemore was produced as

a witness on behalf of the parents. He testified that he did not examine the parents until the Fall of 1983; that he had not seen Mrs. Green for the past two or three months due to adventitious circumstances but Mr. Green has been seeing Dr. Sizemore in Shepherdstown although living in Baltimore, Maryland; it was Dr. Sizemore's professional opinion that the Court could with safety return Tiffany to her parents upon certain conditions as follows:

(1) Both parents to continue psychiatric treatment for one to two years;

(2) The children be examined every three months by a physician for evidence of abuse;

(3) The Department of Human Services should continue to supervise the Respondent parents.

Further his examination of both parents could find no mental diseases nor disabilities although they have been suffering from some adjustment disorder which he concluded would be temporary.

That Charles Kirby, witness for the Respondent parents, a child psychologist at Eastern Panhandle

Mental Health Center, conducted the parenting classes for the Respondent parents, at which classes, in his opinion, the Respondent parents made progress; that he did not see any reason why Tiffany Green should not be returned to her parents;

That Dr. Mildred Williams, a general family physician and witness for the Respondent parents, had treated the children of the Respondent parents and the parents prior to the death of Joseph Marshall Green; that, as far as she could see, there was no reason why the child should not be returned to the parents;

That Glen and Mary Nicely, foster parents of Tiffany Green, with whom the Department had placed Tiffany Green, were presented to the Court; but the only issue for the Court is whether or not custody should be removed from the parents and vested in the Department.

That the Respondent parents, Leslie and Stuart Green, testified that they realized that they had made a mistake, that they had received benefit

from the parenting classes, and that they would not discipline in that manner in the future; the father Stuart further testified that he is living in Baltimore, Maryland, with his mother. That he is employed as a waiter and that the Greens' other child Julie resides with him in Baltimore and that when Leslie Green is released from jail it is the intention of the Greens to reside in Baltimore with their children.

After hearing all evidence and arguments of counsel, the Court doth make the following conclusions of law:

That the welfare of the child is the polar star which must guide this Court;

That on October 5, 1982, the West Virginia statute made no provisions for the removal of a sibling from the home of an abused child. That the specific authority to remove a sibling was not enacted into the statute until the 1984 sessions, March 10, 1984, effective ninety (90) days from passage.

Accordingly, based on all the evidence presented before it, and based on the fact that the Court is of the opinion that there is no reasonable likelihood that the conditions of abuse leading to the death of Joey Green can be substantially corrected in the near future pursuant to West Virginia Code Section 49-6-5, as the rehabilitation efforts were begun only after the criminal process as to both parents was at an end and the handwriting was on the wall, it is

ADJUDGED and ORDERED that the child Tiffany Green is not to be returned to her parents, and that all parental rights and responsibilities of Stuart and Leslie Green to the child Tiffany Green are hereby terminated, with custody, care and control to be awarded the Department of Human Services with the power to consent to adoption and further powers to obtain and provide the needed medical and dental attention, to all of which the Respondent parents object and except.

At this time, Counsel for the Respondent

parents did move the Court grant an improvement period, which Motion the Court does overrule, for reasons already upon the record.

WHEREUPON the Court inquired as to all parties present if there was anything further, and Counsel for the Respondent parents indicated that they wished to be furnished with a free transcript of the proceedings in order to appeal the decision of the Court, and, it appearing that the Respondent parents have executed the requisite affidavit of indigency at a prior date, it is

ADJUDGED and ORDERED that the Court Reporter do prepare a transcript free of charge at the earliest convenience of the Reporter.

The Court did then inquire of the guardian ad litem as to whether or not he had any objection to the ruling of the Court, and he indicated that he did not wish to object and except to the ruling contained in this Order.

There being nothing further to consider, the Court did declare the hearing at an end.

This Order was presented to me on December 11, 1984.

/s/ Vance E. Sencindiver

JUDGE

Received and Filed in the
Office of the Clerk of the
Circuit Court of Jefferson
County, WV on 12/14/84
/s/ P.R. Spates
Assistant Deputy Clerk

APPENDIX B

IN THE CIRCUIT COURT OF JEFFERSON COUNTY,
WEST VIRGINIA
SITTING AS A JUVENILE COURT

STATE OF WEST VIRGINIA

vs. Child Abuse/
TIFFANY GREEN, Infant Neglect Petition
STUART GREEN, Father 82-J-74
LESLIE GREEN, Mother

O R D E R

This matter came on to be heard this 2nd day of July, 1985, upon a Motion for Modification of the Dispositional Order terminating the parental rights of the respondents, Stuart Green and Leslie Green, hereinafter called the movants; upon the appearance of J. Michael Cassell, Assistant Prosecuting Attorney of Jefferson County, West Virginia; upon the appearance of the said movants in person and by Richard C.B. Woods, Esq.; upon the appearance of the respondent child, Tiffany Green, in person and by James Crawford, guardian ad litem,

and was argued by counsel.

Whereupon the Assistant Prosecuting Attorney moved the court to appoint counsel for the foster parents of Tiffany Green, Mr. and Mrs. Glenn Nicely, and in consideration of which, the Court doth find that the interests of the foster parents are adequately represented by the Assistant Prosecuting Attorney and the said Motion is hereby denied; to which ruling the Assistant Prosecuting Attorney did note his exception.

Whereupon the Assistant Prosecuting Attorney moved the Court to prohibit the introduction into evidence of all matters relating to the adequacy of the assistance of the former attorney for the movants; such evidence being outside the scope of the Court's inquiry pursuant to §49-6-6, Code of West Virginia as amended, the statute upon which the Motion is founded. In consideration of which, the Court doth find that evidence relating to the adequacy of the assistance of the former attorney for the movants is outside the scope of

the Court's inquiry pursuant to §49-6-6, Code of West Virginia, as amended, and it is hereby ORDERED that evidence relating to the adequacy of the assistance rendered by the former attorney for the movants shall be prohibited for purposes of this hearing and it is further ORDERED that counsel for the movants shall have the opportunity to vouch the record for purposes of appeal; to which ruling, the movants do note their exception.

Thereafter the Court removed all persons from the hearing except the movants, counsel of record for the parties, and guardian ad litem and the Court Reporter, and the Assistant Prosecuting Attorney requested that an agent of the State of West Virginia be allowed to remain to assist him during the hearing. Whereupon the court denied the request; to which the Assistant Prosecuting Attorney did note his exception.

Thereafter the Court proceeded to hear the testimony of various witnesses in support of the Motion to Modify the Dispositional Order. At the

conclusion of the evidence on behalf of the movants, the Assistant Prosecuting Attorney moved the Court to deny the said Motion to Modify, and in consideration of which, the Court overruled the Motion of the State, to which ruling the Assistant Prosecuting Attorney did note his exception.

Whereupon the Court proceeded to hear the testimony of various witnesses in opposition to the Motion to Modify and at the conclusion of the evidence of the State of West Virginia, the movants introduced the testimony of a rebuttal witness. Thereafter the Court retired to chambers to consider the evidence and counsel for the movants vouched the record for purposes of appeal on the issue of the adequacy of the assistance of the former attorney for the movants.

Whereupon the Court reconvened the hearing and upon consideration of the testimony of the various witnesses and the arguments of counsel for the parties and the guardian ad litem, the Court did dictate into the record its findings of

fact and conclusions of law, a transcription of which is attached hereto and incorporated herein, and therefore it is hereby

ADJUDGED and ORDERED that the Motion for Modification of the Dispositional Order Terminating the Parental Rights of the Respondents is DENIED.

Thereafter counsel for the movants noted their exception to the ruling of the Court and moved the Court to place the movants upon a post-dispositional improvement period is denied, to which ruling, counsel for the movants did note his exception.

The Clerk shall enter the foregoing as of the day and date first above written and shall transmit copies teste to all counsel of record.

/s/ Patrick G. Henry, III

Judge

A true copy attest:

Rosa W. Lynch

Clerk, Circuit Court

B6

Jefferson County, W. VA.

BY: /s/ Judith S. Simmons

Deputy Clerk

APPENDIX C

DEPARTMENT OF HUMAN SERVICES
OF THE STATE OF WEST VIRGINIA
vs. JUVENILE
TIFFANFY GREEN, Infant PETITION
LESLIE GREEN, Mother No. 82-J-74
STUART GREEN, Father

Portion of proceedings had and testimony taken before the Honorable Patrick G. Henry, III, Judge, on July 3, 1985.

COURT:

All right, thank you. Now I think counsel will agree that in effect if I were an appellate court, this could be a case of first impression. There is virtually no law in this state of any assistance. There are no guidelines, no standards.

According to our statute, there's not even any discretion as to whether or not the Court holds a hearing. It is mandatory. Even to the extent that in the event of a termination of parental rights and let's say the passage of ten years and

the child has been in a prospective adoptive home but for some reason they've never gone through with it, the natural parents would be permitted even with a ten year attachment to prospective parents, to come back into court under an alleged change of circumstances and reopen the entire matter.

We're thankfully in tiis case not dealing with the passage of ten years time. Effectively we're dealing most concisely with the passage of time from October of 1984 through this date. Which is one of the few things I can be thankful for that we're not going through, in effect, directly less than a year and collaterally going back approximately essentially three to four years.

The Court is further concerned about the absence of the pychological profile conducted on Tiffany which was apparently conducted in the summer of 1984. It does not appear of record unless it is with the exhibits that were transmitted to the State Supreme Court of Appeals. And without

knowing what the results were of that evaluation, the Court feels that there is a link missing which could have been of assistance to the Court in placing other expert testimony in its proper perspective.

The statute with which we're concerned deals with a substantial change of circumstances which may justify a change of custody. As I've stated before, by virtue of the polar star concern of the Court for the welfare of the child, somwhere in that statute is the inherent consideration of the child's welfare and that a mere substantial change of circumstances is not sufficient upon which to justify modification. The interests of the child separate and apart from consideration of changes must be considered by the Court in rendering of its decision.

Now whether that standard be the standard of (Holstein) where the change must be shown to materially promote or whether because we're dealing with the intervention by the state, the standard to be shown by the Petitioners is less.

This Court is without assistance by our state Supreme Court and I will muddle through it the best I can under the circumstances.

I will note for the benefit of counsel that in reviewing the prior proceedings we have some contradictions between the evidence adduced today and prior evidence. Specifically the hearing in October of '84 the testimony of Bradley Soule on Page 50 of the transcript in his evaluation of the Greens of October and November of 1982 found in using the garbage word, no brainwashing. Which is in contradiction to the testimony of Dr. Goldstein who found clear evidence of a cult atmosphere and cult influences on the Greens.

Additionally, Dr. S-T-O-C-K-E-S, I don't know whether its Stoakes or Stockes on Page 58 of the transcript who evaluated Tiffany and except for the actual knowledge to the contrary believed that the relationship between Tiffany and the Nicely's was that of a natural parent and child. That tends to contradict the testimony of Dr.

Rosenberg.

And in considering the evidence at the proceedings for these two cases and the Court must at least note those contradictions in order to place all the evidence in its proper perspective.

Through the testimony of Stuart Green we heard considerable evidence regarding the cult atmosphere of the Stonegate community. And the uniform system of child discipline which progressively became more severe after 1981 and which for the purposes of this proceeding, culminated on October 5, 1982, when he overheard Leslie discipling his son, Joey, assumed the duties of disciplinarian, and entered into a beating of Joey for a period of two hours which resulted in his death due to hemorrhaging.

There was also considerable testimony as to the events in changes in his life since October of 1984. That he has in effect left the commune atmosphere, that he's residing with his mother and stepfather in Baltimore, that he's undergoing

counseling for which the prognosis is good to excellent and is ongoing.

Dr. Goldstein in his evaluation of the information available to him felt that it was quite clearly a cultist atmosphere, that the Greens were subjected to the whims of Dorothy McClellan to the extent as he characterized it, that dogma took precedence over all human experience. And therefore what happened to Joey Green was not true child abuse in the sense that we commonly think of it.

That is very convenient, psychologically. Unfortunately our statutes in this court are concerned with the result and not the motivation for the damages or injuries that are inflicted on the child. And while motivation or good intentions may act in mitigation, we are still dealing with the death of a child and still dealing with a basic failure of human compassion through the death of Joey, and the death and the severe beatings of other children for protracted periods of time.

And while it is clinically a matter which a

psychologist can deal with, it is a different matter for those who have to deal with the legal culpability and the realities of life.

It is interesting to note that the apparent justification for Dorothy McClellan's dogma was religous in nature and going back as far as Abraham and his son and coming through the Crusades and Spanish Inquisition, it is unfortunately absurdly true that religion is responsible for countless atrocities committed in the name of saving mankind or an individual and this is a matter that the state has always had problems dealing with in the United States because of delineation between church and state. It makes it that much harder to understand how this could have happened in the name of religion. And tnat much more difficult for the state to justify intervention.

Subject to the contradictions I raised previously, Dr. Rosenberg testified as to the good parent-child relationship existing between the Greens and Tiffany. Based upon his evaluation conducted yesterday

and his opportunity to observe the child in an atmosphere where he could compare the parents and the foster parents. That's also contradicted by the testimony of Jan Adams. Of course, there we get back to the old problem of the lesser qualified expert who has greater contact versus the greater qualified expert who has lesser contact and to what extent courts are willing to recognize the ability of an average individual to correctly identify human nature or to make observations regarding human behavior.

Jan Adams had concern for the present bonding between Tiffany and the Nicelys and was concerned that the passage of three years would result in upheaval of Tiffany if she's removed from the Nicelys at this time. She further indicated that she is not yet satisfied with the progress of the Greens.

The Court then heard the testimony of Ed and Jenny Schlosser, Lawrence Crum, Semore Sandick. Admittedly all relatives of the Greens, but

all in a position to observe changes in behavior and changes in attitude. And although taken with a grain of salt, the Court has no problems in acknowledging that the Greens have undertaken a radical effort to change their lifestyle and through counseling to get back to a normal life.

There is also strong indication of good family support both financially and emotionally and a unification of family efforts towards the uniting of this family. The very strong consideration on behalf of the Greens.

As I've raised to counsel before, I have problems with regard to the status of Julie and allowing that to carry great weight on the plus side for the benefit of the Greens, I acknowledge that there have been no indications presented to the Court of any problems arising with respect to the care and parenting by the Greens to Julie while they've remained in the same household.

This in consideration of the fact that the grandparents have deferred most parenting duties

on behalf of the Greens would show that the Greens are exhibiting a strong sense of active parenting and presumably within the normal acceptable range.

We run then into the testimony of Mrs. Nicely. And though perhaps there may have been matters raised on cross examination which were not as a result of the Greens affection for her, she denoted no change in effect over the past years from 1982 to the present with respect to the Greens conduct, behavior, attitudes. I must also take her testimony with a grain of salt as a result of the obvious emotional bond which she has with Tiffany and while I'm not going to find or allude to a direct intent to mislead the Court, she has a vested interest in not being observant to say the very least.

Through the testimony of Leslie Green I finally found someone from Stonegate who actually acknowledged that they were uncomfortable with the beatings. And at least with respect to her own son being beaten, had to withdraw. I agree with one proposition tendered by Mrs. Green and that

is in effect, if you are not under the influence of the cult, you cannot understand how this could happen. And I don't think that the rest of the world can understand how a parent could stand by and beat a child for two hours doing it in the name of God or to watch another child being beaten for four hours and not intervene.

It is almost akin to Nazi Germany where the blind following of orders was the justification for all inhumanity and was expected to be the exoneration of all culpability. It is incomprehensible to the average person how anyone regardless of the amount of indoctrination can allow this to happen.

Now is may be understandable to the psychologists. But to a parent, I agree with her that I cannot understand it.

We're dealing through the Greens with two individuals who have to date never lived on their own either as a married couple and their relationship with each other or as parents with the sole responsibility of their children. They first lived in their

respective homes, then at Stonegate, for a period of time each was in jail, and now they're residing with his parents in Baltimore.

There's constantly been that umbrella of protection for what appears to be almost the last 15 years. There's also the consideration that although the prognosis is good with respect to their psychological development, Dr. Goldstein represents that Stuart is detached from the cult and Leslie is less so. And acknowledes that each requires additional therapy.

When questioned by the Court, he acknowledged that there's always the possibility of anxiety. And we have in any normal human relationship with another person or persons a stress created each time there is a change of circumstances.

Psychologists like to have a chart whereby you go down and check off certain things that have happened in your recent past and account a point value to each event. And if you reach a certain total that you should consider counseling.

Events such as a loss of a job or divorce or change of residence. I have great concern at this point that the Greens are not making it on their own and while I join Mr. Crawford in commending them for breaking from the past and working to the future, I am simply not satisfied that the circumstances to which Tiffany would be returned on this date would be in the best interests of the child in considering the present level of psychological advancement of the parents and of the continued dependency of the Greens on external assistance in order to manage their lives.

The Court considers implicit as a conclusion of law that it must find that the proposed change is in the best interests of the child which I cannot do at this point in time. I do not agree that the (Holstein) standard should attach to the Greens. I don't think the burden is that high upon them to show that it would materially benefit the child. But to uproot the child from what has been a reasonably stable environment for the past three years,

and lodge the child in a home which is now replete with counseling and an impending move from one residence to another, and within some foreseeable time a relocation of the Greens from out of the household of his parents, the Court must consider those future disruptive events in determining that the present status of the child appears to be stable, appears to be beneficial to the welfare of the child, and the Court cannot conclude that the statutory mandates have been met sufficient to justify modification of the prior order of the Court.

Accordingly it is adjudged and ordered that the Petition for Modification be and the same is hereby denied. Counsel, you may show your objection to the Court's ruling.

MR. WOODS:

Thank you, your Honor. I would except and object to the Court's ruling.

Your Honor, this proceeding also would allow the Court to grant a post-dispositional improvement period and I will assume for the sake of this hearing

that such a motion is also at this time denied?

COURT:

It is denied. Once parental rights have been terminated under those circumstances, you can't have an improvement period. Now it may well be that by the time the Supreme Court has had a chance to hear this matter, I may be on my way being referred to as learned counsel which is generally reserved for Judges who get reversed, and that it may be remanded for further hearing. And that by that point in time the progress of your clients may be satisfactory to justify a change.

And I don't want to stop their efforts. I am in a position of weighing the welfare in this proceeding. I am concerned only about Tiffany. Based on past actions and future projections, and unfortunately the past always speaks stronger than the future, and I'm not willing to risk the life of a child unless I'm satisfied.

Now the Court Reporter is directed to insofar as she's humanly possible to do, to give priority

to the preparation of this transcript and the Court hereby directs that a copy of the transcript be made available to counsel for submission and incorporation into is present appeal before the West Virginia State Supreme Court of Appeals.

MR. WOODS:

For the record, also, your Honor, I would like to extend the grateful appreciation of Stuart and Leslie Green and myself as counsel for the tremendous effort that the Court has made to allow this proceeding to continue until its termination and I know we've really -- you've bent over backwards. And we appreciate that and I want to thank you on the record.

Oh, and I would also note, of course, my exception and objection to your denial of the motion -- for an improvement period.

COURT:

This hearing is adjourned.

APPENDIX D

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 27th day of May, 1986, the following order was made and entered, to-wit:

Department of Human Services of The State of West Virginia

vs.

Tiffany Green, Infant, et al., Defendants Below
Leslie Green, Mother and Stuart Green, Father

On a former day, to-wit, March 6, 1986, came the petitioners, Leslie Green, Mother and Stuart Green, Father, by Richard C.B. Woods, their attorney, and presented to the Court their petition praying for an appeal from and superdeadeas to a judgment of the Circuit Court of Jefferson County rendered on the 3rd day of July, 1985, with the record therein accompanying the petition, which being seen and inspected by the Court the appeal prayed for is refused.

A True Copy

Attest: /s/ George W.
Singleton
Clerk Supreme Court
of Appeals

APPENDIX E

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charlestown, Kanawha County on the 7th day of November, 1985, the following order was made and entered, to-wit: Department of Human Services of the State of West Virginia

vs.

Tiffany Green, Infant, etc., et al.

On a former day, to-wit, May 15, 1985, came the petitioners, Stuart Green and Leslie Green, by Richard C. B. Woods, their attorney, and presented to the Court their petition praying for an appeal from and superseadeas to a judgment of the Circuit Court of Jefferson County rendered on the 14th day of December, 1984, with the record therein accompanying the petition, which being seen and inspected by the Court the appeal prayed for is refused.

A True Copy

Attest: /s/ George W. Singleton
Clerk Supreme Court of Appeals

APPENDIX F

IN THE SUPREME COURT OF APPEALS

OF THE STATE OF WEST VIRGINIA

DEPARTMENT OF HUMAN SERVICES

OF THE STATE OF WEST VIRGINIA

vs. PETITION FOR WRIT

TIFFANY GREEN, Infant OF ERROR AND

LESLIE GREEN, Mother SUPERSEADEAS

STUART GREEN, Father

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

Notice is hereby given by LESLIE GREEN, mother above-named, and STUART GREEN, father above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Appeals of the State of West Virginia, refusing an appeal, entered in this action on May 27, 1986.

This appeal is taken pursuant to 28 U.S.C. §1275(2).

/s/ Richard C.B. Woods

608 Winans Way
Baltimore, Maryland
21229
(301) 233-0772
Counsel for Appeallants
Stuart and Leslie Green

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 31st day of July, 1986, a copy of the aforegoing NOTICE OF APPEAL was mailed, via first class mail, postage prepaid, to Michael J. Cassell, Esquire, Assistant Prosecuting Attorney for Jefferson County, P.O. Box 729, Charles Town, West Virginia 25414, attorney for the Department of Human Services; James B. Crawford, III, Esquire, P.O. Box 711, Charles Town, West Virginia 25414, guardian ad litem for Tiffany Green, Infant; George W. Singleton, Clerk of the Supreme Court of Appeals of West Virginia, Charleston, West Virginia 25305; and the Circuit Court for Jefferson County, West Virginia, Court House, Charles Town, West Virginia 25414.

F3

/s/ Richard C.B. Woods

APPENDIX G

W. VA. CODE §49-6-2 (1985 Cum. Supp.)

(a) In any proceeding under the provisions of this article, the child, his parents, his custodian or other persons standing in loco parentis to him, such persons other than the child being hereinafter referred to as other party or parties, shall have the right to be represented by counsel at every stage of the proceedings and shall be informed by the court of their right to be so represented and that if they cannot pay for the services of counsel, that counsel will be appointed. If the child or other parties have not retained counsel and the child and other parties cannot pay for the services of counsel, the court shall, by order entered of record, at least ten days prior to the date set for hearing, appoint an attorney or attorneys to represent the child and other party or parties and so inform the parties. Under no circumstances may the same attorney represent both the child and the other party or parties; however,

if more than one child from a family is involved in the proceeding, one attorney may represent all the children. The court may allow to each attorney so appointed a fee in the same amount which appointed counsel can receive in felony cases.

(b) In any proceeding under this article, the parents or custodians may, prior to final hearing, move to be allowed an improvement period of three to twelve months in order to remedy the circumstances or alleged circumstances upon which the proceeding is based. The court shall allow one such improvement period unless it finds compelling circumstances to justify a denial thereof, but may require temporary custody in the state department or other agency during the improvement period. An order granting such improvement period shall require the department to prepare and submit to the court a family case plan in accordance with the provisions of section three, article six-d of this chapter.

(c) In any proceeding under this article, the

party or parties having custody of the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses. The petition shall not be taken as confessed. A transcript or recording shall be made of all proceedings unless waived by all parties to the proceeding. The rules of evidence shall apply. Where relevant, the court shall consider the efforts of the state department to remedy the alleged circumstances. At the conclusion of the hearing the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected, which shall be incorporated into the order of the court. The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof.

(d) Any petition filed and any proceeding held under the provisions of this article shall, to the extent practicable, be given priority over any other

civil action before this court, except proceedings under article two-a, chapter forty-eight of this code and actions in which trial is in progress. Any petition filed under the provisions of this article shall be docketed immediately upon filing. Any hearing to be held at the end of an improvement period and any other hearing to be held during any proceedings under the provisions of this article shall be held as nearly as practicable on successive days and, with respect to said hearing to be held at the end of an improvement period, shall be held as close in time as possible after the end of said improvement period.

(e) Following the court's determination, it shall be inquired of the parents or custodians whether or not appeal is desired and the response transcribed. A negative response shall not be construed as a wavier. The evidence shall be transcribed and made avaiiable to the parties or their counsel as soon as practicable, if the same is required for purposes of further proceedings. If an indigent

person intends to pursue further proceedings, the court reporter shall furnish a transcript of the hearing without cost to the indigent person if an affidavit is filed stating that he cannot pay therefor.

APPENDIX H

W. VA. CODE §49-6-5 (Supp. 1985)

(a) Following a determination pursuant to section two of this article wherein the court finds a child to be abused or neglected, the court may request from the state department information about the history, physical and emotional condition and present situation of the child. The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard. The court shall give precedence to dispositions in the following sequence:

(1) Dismiss the petition;

(2) Refer the child, the abusing parent or other family members to a community agency for needed assistance and dismiss the petition;

(3) Return the child to his or her own home under supervision of the state department;

(4) Order terms of supervision calculated to assist the child and the abusing parent or parents which prescribe the manner of supervision and

care of the child and which are within the ability of the parent or custodian to perform;

(5) Upon a finding that the abusing parent or parents are presently unwilling or unable to provide adquately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or a suitable person who may be appointed guardian by the court;

(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and when necessary for the welfare of the child, terminate the parental or custodial rights and responsibilities and commit the child to the permanent guardianship of the state department or a licensed child welfare agency. If the court shall so find, then in fixing its dispositional order, the court shall consider the following factors: (1) The child's need for continuity of care and caretakers; (2) the amount of time required for the child to

be integrated into a stable and permanent home environment; and (3) other factors as the court considers necessary and proper. Notwithstanding any other provisions of this article, the permanent parental rights shall not be terminated if a child fourteen years of age or older or otherwise of an age of discretion as determined by the court, objects to such termination. No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final.

(b) As used in this section, "no reasonble likelihood that conditions of neglect or abuse can be substantially corrected" shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect, on their own or with help. Such conditions shall be deemed to exist in the following circumstances which shall not be exclusive:

(1) The abusing parent or parents have habitual-

ly abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such abusing parent or parents have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning;

(2) The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control;

(3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child;

(4) The abusing parent or parents have abandoned the child;

(5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems or assist the abusing parent or parents in fulfilling their responsibilities to the child; or

(6) The abusing parent or parents have incurred emotional illness or mental deficiency of such duration or nature as to render such parent or parents incapable of exercising proper parenting skills or sufficiency improving the adequacy of such skills.

(c) The court may as an alternative disposition allow to the parents or custodians an improvement period not to exceed twelve months. During this period the parental rights shall not be permanently

terminated and the court shall require the parent to rectify and conditions upon which the determination was based. No more than one such postdispositional improvement period may be granted. The court may order the child to be placed with the parents, a relative, the state department or other appropriate placement during the period. At the end of the period the court shall hold a hearing to determine whether the conditions have been adequately improved, and at the conclusion of such hearing, shall make a further dispositional order in accordance with this section.

APPENDIX I

W. VA. CODE § 49-6-6 (1980).

Upon motion of a child's parent or custodian or the state department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section two [§ 49-6-2] of this article and may modify a dispositional order: Provided, that a dispositional order pursuant to subdivision (6), subsection (a) of section five [§ 49-6-5] shall not be modified after the child has been adopted. Adequate and timely notice of any motion for modification shall be given to the child's counsel, counsel for the child's parent or custodian and to the state department. (1977, c. 65.)

APPENDIX J

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v. CHILD ABUSE/

JACOB FANSLER, NEGLECT PETITION

Infant, et al. 83-J-24

ORDER

This matter came on to be heard the ____ day of February, 1986, upon the motion of the Respondents, Stuart and Leslie Green, requesting a modification of the Order of this Court dated November 30, 1984; uopn the appearance of the petitioner by J. Michael Cassell, Assistant Prosecuting Attorney; upon the appearance of Stuart and Leslie Green, Respondents, by Richard C.B. Woods, Esq.; upon the appearance of Julie Green, infant, by her Guardian Ad Litem, James B. Crawford, Esq.; and was argued by counsel.

It appearing to the Court that the Order dated November 30, 1984 incorporated the Joint Petition

of these Respondents, the Guardian Ad Litem for Julie Green, and the Petitioner; it further appearing to the Court that the said Order granted temporary legal custody of Julie Green to the Department of Human Services and granted physical custody of Julie Green to her paternal grandparents upon various terms and conditions set forth in the Joint Petition

Whereupon, the Court reviewed the report of Harold Goldstein, Ph. D., dated October 8, 1985, and the report of the Baltimore County Department of Social Services dated January 14, 1986 and the same are ORDERED filed herein. Thereafter, counsel for Stuart and Leslie Green, respondents, renewed his motion to modify the prior Order of this Court and there being no objection thereto, it is hereby

AJUDGED and ORDERED that the motion of the Respondents, Stuart and Leslie Green, is granted; it is further ORDERED that custody and control of Julie Green, infant, be and hereby is

returned to her natural parents, Stuart and Leslie Green, it is further ORDERED that Stuart Green, Leslie Green and Julie Green, Respondents are dismissed from these proceedings.

The Clerk is ORDERED to place this matter among the causes ended.

The Clerk shall enter the foregoing as of the day and date first above written and shall transmit attested copies to all counsel of record and to the West Virginia Department of Human Services.

15 April 86

/s/Frederick Fox, II

Judge

A true copy attest

Rosa W. Lynch

Clerk, Circuit Court

Jefferson County, W. VA.

BY: /s/ Judy Simmons

Deputy Clerk